Natural Right (1946)[a]

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I propose to discuss certain aspects of the *history* of *natural right*. The problem of natural right is, of course, a *philosophic* and *not* a historical problem. But we are today in the unfortunate position that before we can even *think* of a philosophic discussion of natural right, we have to engage in historical studies. Our position is this: Natural right is no longer taken for granted; it is generally considered, at least among non-Catholics, a delusion; it is no longer in the center of discussion, of philosophic discussion, it is more or less despised; as a consequence, it is no longer really *known*. But it *was* in the center of discussion, it was known in the past. We are in need of a return to the past, of some sort of historical investigation, if we want to familiarize ourselves with the philosophic problem of natural right.

That natural right is a *problem*, a most *serious* problem, can be seen directly, i.e., without historical reflection. Natural right is right that is independent of human arbitrariness. The alternative to the view that there is a natural right seems to be[33] the assertion that all right depends on human arbitrariness, or is man-made, i.e., positive right. This assertion known as legal positivism is difficult to maintain. For: if there is no right but positive right, or positive law, we cannot speak any longer of unjust laws. But we are frequently compelled to speak of unjust laws. The most ruthless exponent[b] of legal positivism was finally compelled to admit that while no positive law or right can be wrong, it may be erroneous. More than that: positive law cannot guarantee its own[34] obligatory character; it cannot answer the

[a] This typescript can be found in Leo Strauss Papers, box 6, folder 15. It was transcribed and annotated by J. A. Colen.

[b] Strauss has inserted "Bergbohm" by hand in the margin. Cf. *NRH*, 10n3: "The legal positivism of the nineteenth and twentieth centuries cannot be simply identified with either conventionalism or historicism. It seems, however, that it derives its strength ultimately from the generally accepted historicist premise (see particularly Karl Bergbohm, *Jurisprudenz und Rechtsphilosophie*, I [Leipzig, 1892], 409ff.)."

question why we ought to obey it irrespective of the policeman around the corner. Why do we respect, and not[35] merely fear, laws enacted democratically as distinguished from laws enacted by the rubberstamp parliament of a dictator? Ultimately because we believe that only the will of the majority has a just claim to our obedience. The justice of majority rule is not and cannot be the product of democratic or nondemocratic legislation; it is derived from principles higher than positive law. That we need such principles, that human life would be impossible without them, is fairly generally admitted. But, some people say, those principles are not a natural right, but the ideals of our society. This is evidently insufficient:[36] are we not compelled to question the ideals of our society? To wonder whether our society plus its ideals is[37] civilized or barbaric? To measure those ideals by ideals[38] which are independent of any parochial or[39] regional predilections or prejudices? But it does not suffice to appeal from the ideals of our society to ideals simply. For we usually understand by ideals: objects of aspiration to which we may, or may not, aspire without any consequence other than that in the first case we are idealists and in the second case something else; we do *not* understand by ideals objects of plain duty which oblige us in our conscience: this obligatory character which is blurred by the term ideals is squarely set forth by the term natural *right*. Besides, ideals are frequently understood as objects of faith; but faith is not knowledge; the Nazis have as much faith in their ideals as democrats have in theirs; there is an indefinite variety of faiths which are mutually exclusive; we cannot help wondering which faith, if any, is the right faith; we are compelled to go beyond the realm of faith into the realm of reasoned discussion in order to acquire, if we can, *knowledge*. The problem of natural right is as serious as our need for standards, accessible to the knowledge of man as man, which are natural, i.e., which are independent of human arbitrariness. If there are no such standards, all human action is blind, because it does not *know* whether its ultimate aims are *right*. If there are no such standards, *everything* is permitted or legitimate.[40]

One merely evades the issue if one says that our translegal standards are expediency or utility. Everything expedient or useful is expedient or useful *for* something. For society, as most people would say. But what is expedient or useful for one section of society may be hurtful to others. Must we consider all sections of society equally, or must we consider, most of all, its most respectable part, or its[41] most numerous part? And does expediency mean chiefly expediency for a higher standard of living, or expediency for moral and spiritual welfare? Others have suggested as the standard "social

cohesion and durability." But one may have social cohesion and durability on the most different levels: on the level of Indian caste society, of China, of Sparta, of Venice, of Britain. Is social cohesion and durability based on oppression as good as the social cohesion and durability of a free society? And if one asserts that freedom is to be preferred to oppression, does one not tacitly appeal to justice, to right, to a right that is not established arbitrarily, but intrinsically right? For does one not imply that every human being has a just claim to liberty?

One equally blurs the issue if one speaks of the idea of justice. For if one understands "idea of justice" in a precise sense, in the sense of Plato or that of[42] Kant, it is identical at least for all practical purposes with natural right. And if one understands "idea of justice"[43] in a vague sense, one certainly blurs the issue. I believe it was Fr. J. Stahl,[a] the founder of the Prussian conservative party, who replaced natural right by the idea of justice, or the ideas of right (*Rechtsideen*). In order to exclude absolutely any right to revolution, in order to prevent any appeal from positive laws however unjust or unreasonable to a higher law, he asserted that the translegal standards of laws have the character, not of right or law, but of ideas: I would say, he asserted that the translegal standards of laws have the character *merely* of ideas.

If these remarks are substantially correct, it would follow that we are necessarily guided by some notion, correct or mistaken, clear or hazy, of natural right. In our time, many people in this country actually believe, whether they know it or not, in the natural right of each to self-realization. For when they demand that everyone be given the opportunity of realizing his self, they do not appeal to any *legal* right; they do not appeal to any particular *American* aspiration which as such would concern only Americans; they do not appeal to a principle of *our* society: for they apply it to all societies by calling societies of the present or past which do not recognize self-realization, backward or reactionary societies. Nor do they appeal to a mere ideal: for they consider those who object to self-realization, in theory or in practice, not merely unidealistic, but unjust or vicious. They appeal then to something that is intrinsically right, if ignored until a very short time ago. What is true of self-realization is true of the rule "From everyone

[a] Friedrich Julius Stahl is not so much the founder as the inspirer of the *Deutschkonservative Partei*, a political party of the German Empire, founded in 1876, which disappears at the end of the World War I, composed mainly by *Junker*, which defended constitutional monarchy but opposed parliamentarianism, the principle of equality of citizens, natural right, and rationalism.

according to his capacity and to everyone according to his needs"[a] and of every other rule of this kind.

Our *need* for natural right does not guarantee, of course, that there *is* a natural right. According to the view that obtains in our age, there is none. The usual arguments adduced in support of this view are as strong as usual arguments usually are. They are usually refuted with the equally formidable arguments of the Saint Georges or Don Quixotes who sally forth on the noble steeds of idealism in order to fight the dragons or sheep called the relativists. I beg leave to follow a more pedestrian course. Present-day opposition to natural right has two main motives. First, an interest in legal security, a desire to secure absolute obedience to the law of the land. Civil obedience seems to be fundamentally endangered if one may have recourse to a law higher than the law of the land. The second motive is "the historical consciousness," i.e., the conviction that all ideas are essentially relative to given nations, classes, epochs, etc. The typical present-day arguments against natural right are: (1) the anarchy, the indefinitely large variety, the disgraceful variety of natural law doctrines proves the shortcomings of all: if there were knowledge, there would be agreement. This anarchy ceases to be a stumbling block, once one admits that all alleged natural right is merely an expression of specific historical situations. (2) If there are certain principles common to every natural law doctrine, these principles are too general, too formal, to be of any significance. The present-day rejection of natural right is usually traced to the alleged discovery made in the nineteenth century of History, of what was formerly called the historical process and what is now being called the historicity of man. This is correct inasmuch as the decisive change was brought about by the attack of the historical school of jurisprudence on natural right jurisprudence (Savigny[b] in Germany and

[a] Karl Marx, slogan is in his 1875 *Critique of the Gotha Program*. The same phrase is used in *NRH*, 148. Strauss appears to translate from the German, "Jeder nach seinen Fähigkeiten, jedem nach seinen Bedürfnissen!," since common English translations are slightly different. In *NRH*, 148, Strauss actually says, "from everyone according to his capacity and to everyone according to his merits."

[b] Friedrich Carl von Savigny (1779–1861) was a nineteenth-century jurist and historian who belonged to the historical school of jurists founded by Gustav Hugo. The works for which Savigny is best known are the *Recht des Besitzes* and the *Beruf unserer Zeit für Gesetzgebung*. Savigny argued in the latter that law is part and parcel of national life. He opposed the idea, common to both French eighteenth-century jurists and Bentham, that law can be arbitrarily imposed on a country irrespective of its state of civilization and history.

Sir Henry Summer Maine in England[a]). But in so far as this is the case, the present-day rejection of natural right rests on very shaky foundations. For the historical school took issue with *modern* natural right, with the natural right of the eighteenth century; it did not really consider the natural right of the Middle Ages and of classical antiquity. The historical school tacitly assumed of course that premodern natural right had been disposed of by modern natural right. This assumption was based on the common belief in a law of progress or else on Hegel's philosophy of history according to which the true elements of each significant position are necessarily preserved in the succeeding positions. Sanguine assumptions of this kind are not borne out by a sober analysis of the criticism of premodern natural right by the originators of modern natural right.

As far as present-day criticism of natural right has any value, it does not presuppose the so-called discovery of History. It is merely a repetition of the age-old criticism of natural right, of the criticism that culminates in the thesis that all notions of justice or morality are conventional. This statement evidently requires some explanation. The notion of conventional belongs to the fundamental dichotomy *natural*-conventional which is implied in the distinction between natural and positive law. The distinction natural and conventional is *not*, as some people believe, a specialty of the sophists and their spiritual descendants, but of course fundamental for Plato and Aristotle as well. It is implied, e.g., in Aristotle's distinctions between natural and positive right, between natural and legal slavery, between the natural sounds and the conventional words. Now, the distinction between natural and conventional was gradually abandoned in the nineteenth century. The historical school raised the claim of having finally dissolved the old bifurcation of law into natural and positive law, of having resolved natural and positive law in a higher unity, by understanding *all* law as historical (Gierke, *Althusius*, 338).[b] How far it succeeded can be seen perhaps from

[a] Sir Henry James Sumner Maine (1822–88) was an English jurist and historian. He maintained that law and society developed "from status to contract." According to the thesis, in the ancient world individuals were bound by status to traditional groups, while in the modern world, in which individuals are viewed as autonomous agents, they are free to make contracts and form associations with whomever they choose. Cf. *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861).

[b] The reference is to Otto Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien: zugleich ein Beitrag zur Geschichte der Rechtssystematik* (Breslau: Verlag Marcus, 1902 [ed. orig. 1880]). Strauss appears to be using the 1939 English translation by

the admission by its last exponent (Gierke) that "the philosophic elaboration of this thought remains imperfect to this day." For what the historical school actually did was *not* to replace the old bifurcation of law into natural and positive by the higher unity of the historical, but to assert the *natural* character of things which had been previously considered fundamentally conventional or dependent on human institution. For the historical school could not understand all law as historical but by understanding all law as the "expression of an organic group-consciousness"; it had to interpret the nation, the ethnic group in particular, as a natural unit, as an organism. The difficulties to which this attempt is exposed could not be solved but by introducing a novel distinction, the distinction between the natural and the historical: human *groups* in particular were eventually conceived of as historical and not as natural. It is the distinction between the natural and the historical which underlies all present-day orientation. So much so that today *the* alternative to the assertion of natural right seems to be the view that all right is *historical*. I contend that this view, the historicist view, ultimately leads back to the conventionalist view of old. Let me explain this.

The conventionalist thesis is to the effect that no right is natural, but that all right, including the translegal standards of right and wrong, owes its being, i.e., its being *right*, to the fact that it has been agreed upon, or accepted, by a given society and to nothing else. The *historicist* thesis is to the effect that no right is natural, but all right owes its being to something more fundamental, or less arbitrary, than the decree of society. Savigny, for example, asserted that all right owes its being primarily and fundamentally, not to conscious legislation or arbitrary decision, but to the "common conviction of the people, to the equally and commonly shared feeling of inner necessity."[a] The common conviction of a people or a people's feeling of inner necessity is from any philosophic point of view nothing but generally accepted opinion which owes its validity, not to its truth, but to the fact that it is generally accepted or agreed upon. Today, historicists usually assert that

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Bernard Freyd, *The Development of Political Theory*. Otto Friedrich von Gierke (1841–1921) specialized in the study of the antecedents of German law. His view of the rule of law and his emphasis on the federal nature of medieval states were famous and controversial. In fact, he asserted that society grows because people associate in groups and groups of groups, from families to the state. He was an opponent of civil law interpretation and theorizing. He was a major influence on the British historian of law F. W. Maitland, who translated as *Political Theories of the Middle Ages* some of Gierke's major works, and on John Neville Figgis.

[a] The reference is to Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (Berlin: Veit, 1840), 19.

the translegal standards of right which are adopted by a given society are determined by the specific character, or the specific *needs*, of that society. The question of course is whether the standards of the various societies are *really* determined by their *needs*, and not rather by their *opinions* about their needs, or by the opinion of the ruling groups about their needs, and hence above all by their opinions about God, world, and man. As far as this is the case, as far as the standards rest on opinion as distinguished from knowledge, they are essentially arbitrary or conventional: opinions have no stability of their own; they have to be stabilized by convention. Conventionalism is superior to historicism because it does not gratuitously assume that each society knows what it needs or that the general will cannot err. It is with a view to difficulties such as these to which the older type of historicism is exposed that the more sophisticated historicists of our time trace all translegal standards of right to "historical *decisions*." But by tracing them to decisions, they almost openly proclaim the arbitrary, the conventional character of all standards.

The choice with which man always was and still is confronted is then that between natural right and the view that all notions of justice are conventional. Not the cushion of historicism but the hard rock of conventionalism is *the* alternative to natural right.[44] Precisely because this is the case, the problem of natural right is our *most* serious problem.

To reach *some* degree of clarity about the *problem*, i.e., the problematic character, of natural right, we turn to the *history* of natural right. That history is presented in the popular literature as well as in a part of the scholarly literature[a] as follows. Natural right or natural law came to the fore with the Stoics, especially the Roman Stoics. The Stoic natural law was adopted by the Roman lawyers, and it was reconciled with the teaching of the Bible by the Church Fathers. The Stoic-Christian natural law is the backbone of Western social philosophy. The natural law of the seventeenth and eighteenth centuries is merely the secularized version of the Stoic-Christian natural law. No error is more grave than that of earlier generations which considered the seventeenth and eighteenth centuries the heyday of natural law, and believed that Hugo Grotius was the father of natural law. The importance of the secularization of natural law in the modern centuries is differently evaluated by different scholars. The late A. J. Carlyle, who is gen-

[a] Cf. the reference to Carlyle below, and the more explicit unpublished text on the state of the literature in Leo Strauss Papers, box 14, folder 9.

erally considered the greatest authority on the subject, apparently did not consider it *very* important. For he said that "at least from the lawyers of the 2nd century to the theorists of the French revolution, the history of political thought is continuous, changing in form, modified in content, but still the same in its fundamental conceptions,"[a] and he understood by these fundamental conceptions primarily the notion of natural right and its corollaries.

Now, a word or two of criticism. It is not necessary to dwell on the obvious fact that natural right was recognized long before the Stoics, e.g., by Aristotle, by Plato, by many sophists. One is justified in saying that natural right is as old, not indeed as philosophy in general, but as *political* philosophy.

It is more important for our immediate purpose to lay the ghost of the so-called secularization of natural right in the modern era. What does secularization mean in this context? Separation of natural right from divinely revealed right? That separation was a foregone conclusion for all classical philosophy, and it was not rejected by medieval philosophy. Or does secularization mean separation of natural right from *natural* theology, from a doctrine concerning God which is based on reason, and not on revelation? There is no necessary or obvious connection between Plato's and Aristotle's natural right and any theology, and Grotius's declaration that natural right would be valid even if there were no God is of scholastic ancestry. The transformation of natural right in the seventeenth century can*not* be described as a secularization of natural right.

This does not mean that there is an unbroken continuity in the history of natural right. Without any question, the seventeenth century witnessed a break with the tradition of natural right. This is indicated with sufficient clarity by the following facts. Firstly, we observe in the seventeenth and eighteenth centuries a most vocal dissatisfaction with the whole traditional doctrine of natural right: certain outstanding men demand an entirely *new*

[a] Strauss refers to A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, vol. 1: *The Second Century to the Ninth* (Edinburgh and London: William Blackwood and Sons, 1903), 2. The context is of the quotation is this: "There are, no doubt, profound differences between the ancient mode of thought and the modern;—the civilisation of the ancient world is very different from that of the modern; but just as it is now recognised that modern civilisation has grown out of the ancient, even so we think it will be found that modern political theory has arisen by a slow process of development out of the political theory of the ancient world,—that, at least from the lawyers of the second century to the theorists of the French Revolution, the history of political thought is continuous, changing in form, modified in content, but still the same in its fundamental conceptions."

doctrine of natural right. Secondly, traditional natural right had been, in the main, a *conservative* doctrine; from the seventeenth century on, natural right became a *revolutionary* doctrine. Whereas the rebellion of the Low Countries against Spain was based on *positive* right, the English civil war, the Glorious Rebellion of 1689, the American Declaration of Independence and the French Revolution were at least partly based on principles of *natural* right. There is no need to trace this change from a conservative doctrine to a revolutionary doctrine to a change in the social circumstances; for it is perfectly intelligible from the change which the meaning of natural right itself underwent in that period. The change which natural right underwent in the seventeenth century is *the* epoch-making event in the history of natural right.

Let us first enumerate the characteristics of modern natural right, of the natural right of the seventeenth and eighteenth centuries.

a) Modern natural right is to a[45] much higher degree than, say, medieval natural right *constitutional* natural right, or *public* natural right. The distinction between public right which orders the commonwealth and its relation to the citizens, and private right which regulates the relation among the citizens, goes back to the Greeks. But only since the seventeenth century do we find a new discipline called *jus publicum universale sive natural*: a public right valid for *all* states, and hence based, not on customs, precedent, or positive law, but on natural reason alone (the Dutchman Ulrich Huber[a] published in 1672 *De iure civitatis libri tres novam*[46] *disciplinam iuris publici universalis continentes*). Works such as Hobbes's *Leviathan*, Locke's *Civil Government*, and Rousseau's *Social Contract* are works devoted to universal, i.e., natural, *public* right. The alternative title of the *Social Contract* is "principles of political right"—of course of the political right of *every* society. Natural right was described by Ulpianus as a part of *private* right. As a rule, however, natural right was considered in premodern times to have certain implications regarding constitutional right. But these implications were of a very general, and hence fairly innocuous, character: they did not go beyond establishing the illegitimacy of tyranny. In modern natural right,

[a] Ulrich (or Ulrik) Huber (1636–94) was a professor of law at the University of Franeker and a political philosopher. His major work, *De jure civitatis libri tres*, was published initially in 1672 and continued to be revised until 1694. Huber considered captivity in war, criminal conviction, voluntary renunciation of liberty, and birth from a female slave legal as grounds for slavery. Apart from this work, he was known for his studies on Roman law. He is a typical representative author of the Dutch theory of the conflict of law.

however, the constitutional implications are much more incisive. The first in time is the doctrine of sovereignty; for the whole doctrine of sovereignty, i.e., of the *rights* of the sovereign, is of course a doctrine of natural constitutional right: the rights of the sovereign are determined, not by the customs or precedents or laws of a given society, but universally with a view to the nature of political society as such. As a consequence, the legitimacy, and not merely the expediency, of all sorts of mixed government or of any constitutional limitations of the sovereign is contested: it is contested on grounds of natural constitutional right. Other modern teachers of natural right, Locke in particular, deny the legitimacy of *any* absolute government on[47] grounds of natural right. Rousseau asserts as a doctrine of natural right that only republican government is legitimate. Thomas Paine asserts for all practical purposes that according to natural right only democracy is legitimate. The practical bearing of such doctrines is manifest: there is all the difference in the world between saying that monarchy, for example, is not the best form of government, or that it is undesirable or inexpedient, *and* saying that it is illegitimate. The former assertion does not justify revolution, but the latter does—most emphatically. Natural *public* right is at the bottom of the Declaration of Independence, and above all of the French Declaration of the Rights of Man of 1789, of 1793, and 1795. It is at the bottom of the idea of the necessity of a constituent assembly and of written constitutions: it[48] *prescribes* constituent assemblies and written constitutions. People sometimes are at a loss to understand why the great enemy of the principles of the French Revolution, Burke, could base his opposition to those principles on natural right. The answer of course is that Burke's natural right is one which does not entail incisive consequences for constitutional right, or that is fundamentally the premodern natural right.

b) The *second* characteristic of specifically modern natural right is the *form* in which it is presented. It is presented in complete independence of positive right. In premodern times, the distinction between natural and positive right did not lead to the establishment[49] of a separated *discipline* of natural right, and still less of university chairs exclusively for natural right. It evidently was felt that a complete and self-contained treatment of natural right was either impossible or else[50] of no great value or importance. Only in modern times does natural right take on the form of a *system*—of a *deductive* system. All the great teachers of modern natural right do at least tend toward a natural right demonstrated *more geometrico*. In the lower regions this tendency led to the elaboration of complete *codes* of natural

right, covering even the natural right of fiefs, natural feudal right. "Natural law was treated (sc. in this period) as a code of laws taught by reason, and positive law as a system of ordinances issued for its enforcement" (Gierke, *Althusius* 353).

c) The *third* characteristic of specifically modern natural right is its connection with the idea of a *state of nature*: of a human life prior to the establishment of civil society. In premodern time, there is no such a connection. Premodern natural right was rather the framework of all positive codes than a complete code for a particular status, the state of nature. In the literature, one frequently finds accounts of the state of nature in the teaching of the sophists, of Lucretius, of Mariana, etc. But there is nothing of a state of nature in the texts themselves. The very term state of nature stems, not from reflections on natural right, but from Christian theology. The state of nature is distinguished from the state of grace, and it is normally subdivided into a state of pure nature, prior to Adam's fall, and a state of corrupted nature, the state after the fall. The immediate purpose of the term state of nature in the seventeenth and eighteenth centuries is precisely to deny the significance of the distinction between the state of pure nature and the state of corrupted nature, i.e., to deny the significance, if not the historicity, of the fall of Adam. The traditional theological view of man and society was based on the biblical view of the origins of mankind; the purpose of the modern doctrine of the state of nature was to supply a nonbiblical, rational basis for the new view of man and society. The modern doctrine of the state of nature is in a sense[51] the early form of what today is called anthropology, as appears with particular clarity from Rousseau's discourse on the origin of inequality. On the other hand, by replacing the distinction state of nature–state of grace by the distinction state of nature–civil state, men like Hobbes, Locke, and Rousseau expressed the view that the cure for the deficiencies or inconveniences of the state of nature is, not grace, but orderly government. The term state of nature in this sense takes on central significance for the first time in Hobbes, who still excuses himself for this apparently novel usage.

d) The *fourth* and most important characteristic of specifically modern natural right is that it is, or tends to be, a doctrine of *rights* rather than of *duties*. Premodern natural right was essentially a doctrine of duties. Only very late, in the second half of the sixteenth century, did scholasticism start to speak emphatically of natural rights as distinguished from natural duties or obligations. In Thomas Aquinas's thematic treatment of natural right, and even in that of Richard Hooker at the end of the sixteenth century, nat-

ural rights as distinguished from natural duties are not even mentioned. In the seventeenth century we observe a radical shift of emphasis from duties to rights, a shift of emphasis which determines political and social thought up to the present day. First of all, the very distinction between right and duty becomes much more emphatic than in former ages. Above all, the political society is now conceived of for the first time chiefly or exclusively as serving the purpose of guaranteeing natural *rights*, and not of guaranteeing the performance of man's natural duties. This fundamental change finds its most striking expression in the teaching of Hobbes. It is equally visible in the teaching of Rousseau, whose social contract is preceded exclusively by natural rights, and not at all by duties, or in the teaching of Spinoza, for whom natural right means exclusively the right which man *has* as distinguished from the right which *binds* man. Paine expressed this view most clearly by the title of his book, *Rights of Man*. Kant's and Fichte's doctrines of natural right are essentially doctrines of the *rights* of man. For Kant it is already a *problem* why moral philosophy is usually called the doctrine of duties and not also of rights. Regarding Locke, one merely has to compare his statements based on Hooker with what Hooker himself says in the context of his[52] work in order to see that there is no real continuity between the natural right of Locke and that of Hooker. As to Descartes, he does not mention duties in his ethical treatises: he does speak, in the central passage, of rights.

This characteristic of modern natural right is recognized somewhat obliquely by those who call modern natural right individualistic or subjectivistic. It is less ambiguous to describe modern natural right as concerned primarily with rights as distinguished from duties.

The first step toward an understanding of modern natural right would consist in ascertaining its *origin*. For once we know the man or type of men who originated modern natural right, we know its *spirit*. For the sake of brevity and simplicity, I shall limit myself to the question of the origin of the emphasis on rights rather than on duties. At least since Hegel it has become customary to trace the doctrine of the rights of man to Christianity as such, to the discovery of what was called "the infinite value of the individual soul." Gierke in particular found the thought "that every individual by virtue of his eternal destiny is in his inmost nature sacred and inviolable" "not merely suggested but more or less clearly expressed" everywhere in medieval literature. I have the impression that it is rather less clearly expressed there. It

seems to me that one can easily detect the rights of man in medieval times, if one makes one or more of the following mistakes. Firstly, if one mistakes for a natural *right* something which is *permitted* by the law of nature as either not punishable or even decent. Secondly, if one mistakes for a natural right of A what B is commanded or forbidden by natural law to do to A (e.g., a natural law prohibition against murder does not yet constitute a natural right of each to life, a natural law command to give alms to the needy does not yet constitute a natural right of the needy to alms). Thirdly, if one mistakes for a natural right what is actually a natural duty. E.g., what is sometimes referred to in modern literature as a right to resistance is frequently in earlier times a duty to resistance, or at least something that "is allowed only as a form of obedience" (Figgis);[a] what is in modern times frequently called a right to resistance was originally the duty to obey God rather than man. Or[53] self-preservation is for medieval natural right a duty rather than a mere[54] right, whereas in modern times it is a right and not necessarily a duty. Ritchie in England[b] and Jellinek[c] in Germany have traced the rights of man with greater justice to the English Puritans. Indeed, one merely has to read the Clarke papers or Cromwell's speeches in order to come across natural rights. But is one justified in saying that "Puritan England has produced the theory of natural rights" (Ritchie)? The thesis of Ritchie is inseparably connected with his view of the Reformation as a whole: "The theory of natural rights is simply the logical outgrowth of the Protestant revolt against

[a] John Neville Figgis (1866–1919) was a historian and political philosopher who translated and adapted some ideas from Otto von Gierke. The reference is from *The Divine Right of Kings* (Cambridge: Cambridge University Press, 1914), 221.

[b] Probably David George Ritchie (1853–1903), a Scottish philosopher influenced by Thomas Hill Green and Arnold Toynbee. While he was in Oxford the foundations were laid both for his interest in idealistic philosophy, namely, Hegel, and also for his strong bent toward practical politics. He wrote a book called *Natural Rights* in 1895 and several on Darwinism and politics. Georg Jellinek (1851–1911) was a German public lawyer, considered to be of Austrian origin, who along with Hans Kelsen and the Hungarian Félix Somló belonged to the group of Austrian legal positivists and was considered to be *the* exponent of public law in Austria.

[c] Jellinek is best known for his essay *The Declaration of the Rights of Man and the Citizen* (1895), which argues for a universal theory of rights, as opposed to the culturally and nationally specific arguments then in vogue (particularly that of Émile Boutmy). Jellinek argued that the French Revolution, which was the focal point of nineteenth-century political theory, should be thought of not as arising from a purely French tradition (namely, the tradition stemming from Jean-Jacques Rousseau) but as a close analogue of revolutionary movements and ideas in England and the United States.

the authority of tradition, the logical outgrowth of the Protestant appeal to private judgment, i.e., to the reason and conscience of the individual." As untenable as this view of the Reformation, untenable is the attempt to trace the rights of man to Puritanism. In addition, the more exact investigations of Figgis have shown that the doctrine of natural rights occurs considerable time before English Puritanism in certain Spanish Jesuits and Dominicans of the late sixteenth and of the early seventeenth centuries. However this may be, one thing is the explicit admission of, and even emphasis on, natural rights, and an entirely different thing is the explicit or implicit *preference* given to natural rights as compared with natural duties or obligations. The problem of the origin of modern natural right is the problem of the origin of the orientation by rights rather than by duties. If we formulate, as we must, the question in this way,[55] there can be no doubt as to its answer: *the* originator of modern natural right is none other than Thomas Hobbes. Not only does Hobbes with a clarity and emphasis unusual in former times distinguish between natural right and natural law, i.e., between natural right and natural duty; he even makes the natural right as distinguished from the natural duties the very basis, and hence the limits, of all obligations. The natural right, which he recognizes, the right to one's life, is truly inalienable; it cannot be forfeited by any crime whatsoever. It, and it alone, is necessary and sufficient for determining the nature of political society, its purpose and its absolute limits. To secure man's natural, unalienable right, and for no other purpose, Hobbes's Leviathan is instituted among men. It is a right which every human being has regardless of sex, color, creed, age, merit or sin, not only against every other human being, but against every sovereign and against every society.

It is a right which every human being has even against God—as one is tempted to say, going beyond the letter but hardly beyond the spirit of Hobbes's teaching. Indeed, the principle of modern natural right cannot be understood if one does not take into account its theological implications. The primacy of right over duty presupposes the denial of any superhuman order or will. On the other hand, the complete absence or at least relative weakness of the doctrine of rights of man prior to the seventeenth century is doubtless due to the overwhelming influence of the biblical teaching. The biblical view has been formulated by Cardinal Newman as follows: "the simple absence of all rights and claims on the part of the creature in the presence of the Creator; the illimitable claims of the Creator on the

service of the creature" (*The Idea of a University*, 183).[a] It suffices to refer to the book of Job and the insistence in the Bible on the need for divine mercy. "Behold, as the eyes of slaves look unto the hand of their master, and as the eyes of a maid unto the hand of her mistress, so our eyes wait upon the Lord our God, until he have mercy upon us" (Psalm 123). There is no right against God, because there is no right to mercy. There cannot be rights of man against God, if man owes his whole being to the free act of creation by God, and especially if man's moral being is as it were constituted by duties imposed on him by God. For if this is the case, man's practical concern is not so much with the dignity of his original or natural status as man as with his actual sinfulness (with his being sold to sin) or with his being redeemed from sin, on account, not of his merits, but of the free grace of God. The spiritual climate favorable to the insistence on the rights of man is characterized by an entirely different, by an entirely unbiblical view of the relation of man to God. It is characterized in the first place by the fact that the consciousness of man's sinfulness receded into the background. In dogmatic terms, Adam's fall ceased to be of crucial and even of great significance. The modern concept of the state of nature with its neutrality to the difference between the state of pure nature and that of corrupted nature took care of that.[b] The rights of man took on practical and popular significance for the first time with the English Puritans, whose greatest poet does not seem to have attached exaggerated importance to the fall: "some natural tears" Adam and Eve "dropped, but wiped them soon; The world was all before them."[c] The world ceased to be the valley of tears: it became the best of all possible worlds, seeing that in the worst case sin had affected only the earth which is but a minor planet in an infinite universe not polluted by sin. Even the earth soon became a potential paradise. For the stern justice of God and his glory made place for his unqualified loving kindness, for[56] his sugary sweetness—a kind father would give his children sugar rather than rod, as Bayle points out in one of his arguments against the biblical tradition.[d]

[a] The reference is to John Henry Newman, *The Idea of a University* (London: Basil Montagu Pickering, 1873), 183.

[b] [LS note] cf. my Hobbes 123, n. 2. (The reference is to *PPH*. The quoted note is from *Leviathan*, chap. 13, p. 65, and asserts "Nature [should not] . . . dissociate, and render men apt to invade, and destroy one another," in the context of the presentation of the state of nature.)

[c] John Milton, *Paradise Lost*, 12.645–46.

[d] Probably Pierre Bayle, *Historical and Critical Dictionary*, article on Origen, remark E, part IV.

Those who preferred a sterner language interpreted the age-old view of man as a citizen of the world to mean that man, being a citizen of the world, has rights against the sovereign of the world, against God. It was Leibniz who said that in the ideas of God every monad has a right to demand that God in ordering the other monads have regard to it. In this respect, there is no fundamental difference between Leibniz and his most famous antagonist, Voltaire. On the occasion of the earthquake of Lisbon, Voltaire wrote the following lines which I have to render in prose: "Believe me, if the earth opens its abysses, my complaint is innocent, and my cries are legitimate . . . I respect my God, *but* I love the universe. If man dares to complain about a misery so terrible, he is not proud—*hélas*, he is sensitive."[a] The fact that God has created man a feeling being gives man a right to protest against God's providence, to insist on his rights against God himself. For what possibly is the strongest statement, we have to turn to Kant. It is by virtue of the fall, Kant holds, that man became the equal of angels and of God himself: as regards the *claim* to be an end in himself; in other words, man's owes his very dignity[57] and the rights deriving from it, not to his creation, but to his revolt, to the fall; the expulsion from paradise is a "change" which is perilous indeed, but no less honorable. To sum up this point, we may venture to say that the rights of man came to the fore in a world that tried to preserve all the privileges of man's being created by God while making light of the burdens which so noble an origin must be presumed to entail.—This, however, cannot be the last word on the subject. For there are reasons to suppose that the theological garb owing to which the doctrine of the rights of man achieved its victory was really not more than the protective coloring of an essentially untheological effort.[58]

Before saying something about this effort, I would like to illustrate modern[59] natural right by looking at its moral implications. Whereas premodern natural right was a doctrine of obedience, or at least of conformity with an order not originating in the human will, modern natural right is a doctrine of freedom. But freedom is an ambiguous term. It may mean the liberty to that only which is good, just, and honest, and it may mean the liberty to other things as well. The type of freedom which was fostered by modern natural right can be recognized from the following examples. The natural right to property as interpreted by Locke is the right not limited by

[a] The reference is to Voltaire, "Poème sur le désastre de Lisbonne, ou examen de cet axiome: 'tout est bien'" (1756).

any duties of charity to the unlimited accumulation of capital. The natural right to communicating one's thoughts as interpreted by Kant is the right to speak or to make promises to others whether truthfully and sincerely or untruthfully and insincerely: freedom of speech not limited by the duty of truthfulness. The natural right to publish one's thoughts as interpreted by Milton justifies the claim to liberty of unlicensed printing not only of moral and orthodox books, but likewise of books which are likely to "taint both life and doctrine."[a] Freedom in the sense of the doctrine of the rights of man is a liberty to evil as well as to good, a liberty limited only by the recognition of the same liberty in all other men. It is a liberty, not only for reason, but also for unreason. Nor must we overlook the fact that the limitation of this kind of liberty by the recognition of the same liberty in others is very tenuous, as almost everyone admits today in regard to the liberty of the acquisitive instincts: those endowed by their creator with strong acquisitive faculties will gladly grant the same liberty to indulge their acquisitive inclinations to others which they demand for themselves; they will not lose anything by this deal.

These aspects of modern natural right must remain paradoxical and bewildering, as long as one does not consider them in a broader context: in the context of the attempt made at the beginning of the modern period to establish a *new* science of politics. That attempt followed from the conviction that traditional political science, i.e., fundamentally *classical* political science, had utterly failed. Classical political science had been the attempt to bring to light the best political order as that political order which lives up, within the limits of the possible, i.e., without the assumption of a miraculous or nonmiraculous change of human nature, to the requirements of virtue, of human excellence, *and* whose actualization is a matter of chance. The revolt of modern political philosophy, which was originated by Machiavelli, was directed against what we may call the *utopian* character of classical political philosophy: against its orientation by what would be the best possible solution under the most favorable conditions, *and* against its inability or unwillingness to expect the actualization of the best possible from anything else but chance. Modern political philosophy as such, i.e., in so far as it does not merely continue the classical tradition, is a quest for a political order whose actualization is *probable*, if not even *certain*. It is

[a] Reference to John Milton, "A Speech for the Liberty of Unlicensed Printing," *The Prose Works of John Milton*, ed. Charles Symmons (London: T. Bensley, Bolt Court, 1806), 1: 302.

concerned with a *guarantee* of the actualization of the desirable political order or with the *conquest* of chance. Both the classics and the moderns understand by the desirable order the *natural* order. But whereas for the classics the actualization of the natural order is a matter of chance, for the moderns it is a necessity, or almost a necessity: it would come into being everywhere, by itself, but for the foolish human intervention or ultimately for ignorance. Hence *knowledge* of the natural order, and *diffusion* of that knowledge, is the decisive means for actualizing the natural order of society. And if diffusion of knowledge is not the decisive means, it is at least indispensable. Adam Smith's invisible hand does not produce the natural economic order without the influence of Adam Smith's teaching—just as Rousseau's natural man in the *Emile* does not come into being but with the help of Rousseau.[60] Whereas according to Plato, evil will not cease in the cities if the philosoph*ers* do not rule, according to the moderns, evil will not cease in the cities if philosoph*y* does not rule, i.e., if *non*philosophers who have been apprised of the results of philosophy or science do not rule. In the course of time, people became ever more skeptical as regards the results of enlightenment; but they did not abandon the attempt of getting a *guarantee* of the actualization of the desirable order. In the nineteenth century, it was no longer enlightenment but "History" which was expected to supply that guarantee—or again *Nature* in her progressive process which by means of the survival of the fittest would lead to the desirable end. Present-day view rather expects the[61] emergence of truth by the free market of ideas.[62]

If one wants to discover the desirable political or social order whose actualization is probable, or *everywhere* possible, one has to take one's bearings by men as they actually are, and not by men as they ought to be; by how men mostly are and not by how men rarely are.[a] Now, men are less rarely seekers of pleasures, riches, and honors than they are seekers of truth and justice. Accordingly, modern political philosophy tried to establish an aim considerably *lower* than that of premodern philosophy or theology: an aim which can be reached by man as he mostly is. This attempt has had a remarkable success: the combination of universal freedom and social stability which has been achieved for some time in certain parts of the Western world surpasses everything which in this respect had ever been achieved in the past. Yet exactly because this is a very high achievement, a high price

[a] [LS note in the margin] Cf. *Leviathan*, p. 77, and *Contrat social*: reconciliation of justice and interest.

had to be paid for it. The price which man had to pay for the modern blessings of a high degree of general happiness was the lowering of the peaks, the lowering of man's ultimate aim.

Only from this point of view can one understand the characteristics of modern natural right.

a) In order to have a goal which was likely to be reached, one had to replace the quest for the best order either by the quest for *efficient* government regardless of its level, or by the quest for *legitimate* government. The first alternative led to Machiavellianism and reason of state. The second led to natural constitutional law. In other words, the classical notion of the best political order is inseparable from the conviction that that order stands and falls with a very high development of *character*, of the *moral* character of *all* the citizens. The modern notion of natural constitutional law implies that properly constructed institutions would take care wholly, or decisively, of the problem of political order.

The sternest moral philosopher of modern times, Kant, protested against the view that the right political order would presuppose a nation of *angels*: no, he says, the right political order can be established in a nation of *devils* provided they have sense. The classics were far from being blind to the importance of institutions: the classical origin of the mixed government is a sufficient proof for *that*. But: for the classics the institutions were nothing but devices for *establishing* or *securing*[63] the rule of the virtuous; they were not meant to be a *substitute* for virtue. If the emphasis is on character, one admits the crucial importance of chance: on how many accidents does the formation of character depend! If the emphasis is on institutions, there is a much greater prospect of conquering chance.

b) According to the premodern view, the more specific rules of natural right cannot be *deduced* from the axioms of natural right, for all more specific rules permit of exceptions; whether the specific rule or the exception is in order in a given case can be decided only on the basis of the knowledge of the *circumstances*, and the decision as to whether the rule or the exception must obtain in the circumstances is to be decided by *prudence* or practical wisdom. The question of what would be just in a given case can mostly find no general answer other than this: that would be just what a sensible man would choose in the circumstances. Now, practical wisdom requires maturity, experience of all sorts and conditions of men and situations, the experience of many years; it is normally the preserve of older men. Hence in order to be guided well regarding what is just in more specific cases, one has

to listen to what old men say or write. Thus the distinction between natural right *proper* and *ius gentium*, i.e., the right accepted by civilized peoples in particular, cannot be very rigid in practice, and an independent treatment of natural right is out of the question. From the modern standpoint, the premodern point of view seems to admit elements of extreme arbitrariness, uncertainty, and chance. Who is going to decide, the moderns object, as to who is a sensible man? And what should be done in the conceivable case in which two or more sensible men disagree? In order to get rid of this uncertainty, of the apparent *vagueness* of the principle "how a wise man would determine," natural right transforms itself in the modern period into a deductive system: what is by nature right in specific cases can be found out by *everyone* by means of simple deduction from the axioms of natural right—or, if not, it would not be natural right and the question would have to be decided arbitrarily by the sovereign. Thus the element of chance and uncertainty which is implied in the unpredictably unequal natural distribution of wisdom and folly is eliminated by the geometrical and systematic character of modern natural right. *Method* does not merely bridge the gulf between the wise and the fools by equalizing opportunities to know, as Bacon and Descartes had stated: it offers the additional attraction of making wisdom superfluous.

c) Now let us try to understand the modern concept of a state of nature. What characterizes this concept is *not* the implication that man's nature is *complete* without his actually living in society or his being subject to social discipline. When Aristotle says that man is by nature a political animal, he seems to reject by implication the idea that there could be human life outside of civil society; actually, however, he merely means by his famous saying that man is by nature *capable* of living in society; a man who does not actually live in society is, according to Aristotle, not necessarily a mutilated human being. Since this is so, it is legitimate even from the Aristotelian point of view to distinguish between man's natural status and his civil status, between what he owes to nature and what he owes to human institution. The difference between the moderns and Aristotle is rather this: that Aristotle determines man's natural status with a view to man's natural perfection,[a] whereas the moderns determine it with exclusive regard to qualities which[64] normal human being necessarily possesses. Now, if man's

[a] [LS note] Consider here: according to the moderns the average man is complete outside of society; according to Aristotle, only superior man is complete outside of society.

natural status is defined in terms of human perfection, very high demands on men follow even for the state of nature; but if man's natural status is defined in terms of the natural qualities actually possessed by every human being, the bare minimum demands, if any demands at all, follow, and thus the way is paved for the delineation of a social order whose actualization does not seem to be too difficult or improbable.[a]

The modern concept of the state of nature was decisively prepared by Machiavelli. Apparently, Machiavelli was still more convinced than were the classics of the power of chance: he does not tire of speaking of *fortuna*. Yet he understands by chance no longer exclusively something essentially exempt from any human control, but also something which not merely may be used, but actually be *mastered*. To master chance is something much greater than to make use of chance, greater even than to make the *best* use of chance. Accordingly, for Machiavelli the great statesman is no longer in the best case a man who establishes, under favorable circumstances, the best political order, but the man who establishes *any* political order thanks to his mastering of chance. For this reason, as well as for his distrust of the utopianism of the classics, his chief concern is with the establishment of political order as such, i.e., of efficient government regardless of its level. For this purpose he has to go back behind every established order and to understand how, or by means of what human qualities, the great man can produce order out of chaos. The result is that the great man cannot do this but by making use of such moral qualities and of committing such actions as are necessarily condemned by him after the order has been established. What Machiavelli arrives at is then the view that the morality of the condition antedating civil society is essentially and legitimately lower than the normal morality of civil society, and the lower morality of what we may call the state of nature or, more precisely, of the period of founding[65] influences in various ways the morality suggested by Machiavelli of civil society itself. The orientation by the idea of conquest of chance is a decisive reason for the lowering of standards in modern times.

d) The best political order as conceived by premodern political philosophy was defined in terms of *duties*. Hence, premodern political philosophy

[a] [LS note in the text in parentheses] This interpretation of Aristotle implies that morality as such which necessarily presupposes social discipline, do *not* belong to man's natural perfection. Difference between Thomist and Averroist interpretation. Cf. *E. N.* X; Hayy ibn Yuqdhân; Ibn Bagga [Bâjja], Tadbîr al-mutawahhid. See below, p. XXXff." [LS note in margin] *Republic*, 558b3ff. and 496c3–5.

was utopian insofar as man's duties in the comprehensive sense of the term are not likely to be performed. In order to delineate a social order whose actualization would be probable, nothing was more helpful than the decision to take one's bearings by rights rather than by duties. For man's rights are very close to his self-interest, to his self-interest as everyone can understand it; whereas the kinship between man's duties and his self-interest does not meet everyone's eye. Hence, man can be depended upon to fight for his rights—much more than he can be[66] depended upon to do his duty. "The catechism of the rights of man is easily learned, the conclusions are in the passions" (Burke).[a] The catechism of the duties of man is less easily learned, insofar as the conclusions are not in the passions. From here we understand the revolutionary character of modern natural right as compared with the conservative character[67] of premodern natural right. As long as men took their moral bearings by duties, they were driven to search themselves rather than others as regards the fulfillment of duties; they were not primarily and essentially concerned with the misdeeds of their rulers; in addition, there was always the question as to whether the subjects had the right of punishing their ruler for his transgression of natural law; besides, the subjects might not worry particularly about their ruler's immorality. A ruler's transgression of his duties did not automatically call forth punishment; his keeping within the bounds of natural law was not automatically guaranteed. Premodern natural right was not self-enforcing. An entirely different situation develops once people take their moral bearings by their natural rights. Once this is the case, the ruler's transgressing the boundaries of natural law means nothing but infringement of the subjects' rights, and this is practically identical with touching them where it hurts. Hence there is as it were an automatic guarantee of[68] the enforcement of the punitive clauses of natural right. Modern natural right is, almost, self-enforcing.

There is probably no element of modern natural right which is so important as the interpretation which it gave to the natural right of self-preservation. The right to self-preservation implies the right to the means of self-preservation—of course. But there is a question as to what are the proper means of self-preservation. Or as to who has the right to decide regarding the propriety of various means. According to the premodern view, the decision rests with the wise. This thought, if followed up to its ulti-

[a] The text is found in "Thoughts on French Affairs," in Edmund Burke, *The Works of the Right Honorable Edmund Burke*, rev. ed., (Boston: Little, Brown, 1866), 4: 342.

mate conclusion, leads to the admission of the legitimacy of absolute and irresponsible rule of the wise. Modern natural right gives the diametrically opposed answer. The right to the choice of the means of self-preservation belongs by nature to everyone, regardless of wisdom or stupidity. The reason can be stated as follows: while the fools must be presumed to make foolish choices, they must be presumed also to care more for themselves, to have a greater interest in their own preservation than any wise adviser of them would. In other words, self-interest may supply the want of wisdom. The idea that for all practical or political purposes everyone is a better judge of his true interests than any wise guardian of his would be necessarily leads to democratic consequences. I believe that this idea, probably the most important result of modern natural right, is still the strongest argument, the most sober argument in favor of the democratic principle which we have. We owe that argument to Hobbes and Rousseau.

Modern natural right came into being in opposition to the alleged or real utopianism of premodern natural right. It intended to be emphatically "realistic." There can be no doubt as to the fact that the appeal to the rights of life, liberty, property, etc., had a much stronger attraction and effect than the appeal to that so frequently and so easily ridiculed virtue. What we must start wondering about is whether the modern, realistic, hard-boiled world which as Rousseau noted has replaced virtue by economics has not developed a much more destructive utopianism of its own. For is it not utopian to believe that by lowering one's aims, one guarantees their realization? Is it not more utopian to expect social harmony from enlightened self-interest or either enlightened or unenlightened self-realization than from self-denial? Is it really true that man is so averse to virtue as[69] the modern argument assumes? "Les hommes, fripons en détail, sont en gros de très honnêtes gens: ils aiment la morale" (Montesquieu).[a]

We cannot judge properly of modern natural right if we do not understand premodern natural right. The classic of premodern natural right is Thomas Aquinas. But precisely because he is the classic, because his solution is so perfect, so elegant, it is very difficult to become aware of the *problem* of natural right if one starts from Thomas's teaching. To understand the problem of natural right, one must look at the Thomistic doctrine as one possibility of interpreting the Aristotelian doctrine of natural right.

Aristotle's doctrine is certainly in need of interpretation. For Aristotle

[a] Strauss quotes *L'Esprit des Lois*, book 25, chap. 2.

has devoted to this grave subject barely one page of his work. Hence the first question which comes to our mind is this: why does Aristotle say so little, so *very* little about natural right? The same question arises in regard to Plato and indeed to all the other pre-Stoic philosophers. Why does natural right play such a comparatively negligible role, at least apparently, in pre-Stoic philosophy?

The usual answer is based on the usual, i.e., the Hegelian, interpretation of Plato and Aristotle. Hegel may be said to have replaced the classical distinction between natural and conventional by the distinction between the subjective mind and its[70] reflective reasoning on the one hand, and the objective mind which expresses itself in living institutions on the other. What was formerly called conventional was interpreted by Hegel as the work of the objective mind, of Reason, of a higher form of Reason than that which manifests itself in the reflections of individuals. The discovery of the objective mind distinguished Hegel from Kant and seventeenth/eighteenth-century rationalism. On the basis of this view, Hegel interpreted Plato and Aristotle: Hegel : eighteenth century = Plato and Aristotle : sophists.[a] Accordingly, the political philosophy of Plato and Aristotle was understood as an attempt to understand the life of the Greek city as the embodiment of Reason or the Idea. There cannot be a natural right in Plato and Aristotle which is different from the living order of the Greek city. Only after the collapse of the Greek city (Alexander) did natural right become severed from the city and become a disembodied norm.

This view of Plato and Aristotle is not tenable. For Hegel, the best political order is necessarily identical with some actual order, whereas for Plato and Aristotle the best political order is possibly, and even normally, different from, and transcendent to, any actual order. For Hegel, it is foolish to prescribe to the state how it ought to be as distinguished from understanding it in its intrinsic reasonableness; but Plato and Aristotle have, so to say, no other concern but to prescribe to the city how it ought to be. In this decisive aspect, Plato and Aristotle are at one with seventeenth/eighteenth-century rationalism and Kant against Hegel. We have therefore to explain the relative silence about natural right in pre-Stoic philosophy along different, along non-Hegelian lines.

The reason for[71] that silence may be stated as follows: it is due decisively

[a] That is, Hegel was related to the eighteenth century as Plato and Aristotle were related to the sophists.

to the conviction that natural right is of a very problematic character as a norm of social conduct; natural right is not only not *sufficient* for ordering society, it would even be *destructive* of society, if it were not *diluted* by a fundamentally conventional right.

In Xenophon's *Education of Cyrus* the following story is told.[a] The boy Cyrus attended, as all other Persians boys did, a school of justice. One day, he was given the following case to decide: a big boy had a small coat, and a small boy had a big coat; the big boy took the small boy's big coat and gave the small boy his small coat; Cyrus decided that this was well done. He was refuted by the argument which is still generally used to refute jurisprudence of welfare: he got a spanking, and his teacher told him that he had not been asked to decide what was most *fitting* but what was *just*, i.e., in this particular case who was the rightful owner of the big coat. The implication is obvious: the naturally right is precisely the fitting, but the orientation by that natural right would play havoc with all settled life. Plato's *Republic* as a whole is an indirect representation of how what is naturally right would be destructive of almost everything which we cherish and consider just: property, monogamous family, prohibitions against incest, privileges of old age, etc. The natural right in the strict sense would be that the truly wise have absolute and irresponsible power and allot on this basis to everyone what he truly deserves, what is truly fitting for him, i.e., what would make him a better man. Naturally, right is the rule of the naturally superior; but this natural right is in conflict with what people generally *believe* to be right; they believe that it is right that every social order should be based on consent, regardless of the wisdom or folly of those consenting. The only practicable solution is the *dilution* of the *naturally* right principle of rule of wisdom by the *supposedly* right principle of consent (*Legg.* 757, cf. *Rep.* 501b); of the naturally right principle of inequality by the conventionally right principle of equality or ruling and being ruled in turn of all (*E.E.* 1242b28 ff.). Or, to take a more specific example, Aristotle distinguishes slavery according to natural right from slavery according to conventional right; a man may be naturally a freeman and yet a slave according to conventional right; his being a slave is against natural right, and yet just. The underlying idea is that the appeal to natural right from a conflicting conventional right would be destructive of settled social life. The difficulty goes even deeper: natural

[a] Leo Strauss explains this story in *NRH*, 147–48. It is taken from Xenophon's *Cyropaedia* 1.3.16–17.

right is the right of the wise to absolute rule; of course, to rule in the interest of the less wise or the unwise. But here the formidable question arises as to whether it can be naturally right that the better *serve* the worse, that the higher *serve* the lower (cf. RMbM *Comm. on Mishna*—Heinemann, *Uebermensch*; *Politics* 1254b33ff.).[a] Natural right could be in itself a norm of social conduct, if social life could dispense with fictions, myths, or noble lies; but the opposite is the case: not truth but opinion is the element of social life (cf. apart from *Rep*.: Rousseau, *p. m*.,[b] 331, p. 2 ff.).[c]

Aristotle reconciled this difficulty with the evident need for natural right by a radical limitation of the subject matter of natural right. According to him, natural right is that right which by nature obtains among the full members of a political society; it is essentially limited to the members of that group, a *Binnenmoral*. But this apparently creates new difficulties. This is shown most simply by the fact that Aristotle's natural right is interpreted in diametrically opposite ways by Thomas Aquinas on the one hand, and by the Islamic-Jewish philosophers on the other. According to Thomas, Aristotle taught that there is a natural right and that the principles of that natural right are immutable, i.e., not open to any exceptions. According to the Islamic-Jewish philosophers, Aristotle taught that there is no natural right strictly speaking, but that there is a kind of conventional right which is a *necessary* convention of all political societies, and that this quasi-natural right is radically changeable, i.e., subject to exceptions. The "Averroist" interpretation is in manifest conflict with Aristotle's explicit statement that there is a natural right. The Thomist interpretation, on the other hand, is in manifest conflict with Aristotle's explicit[72] statement that *all* natural right is changeable. I suggest this interpretation.

Aristotle does not understand by natural right any *rules*, but those just determinations of given cases which are based exclusively on principles of

[a] RMbM is the acronym for Rabbi Moses ben Maimon or Maimonides. Leo Strauss inserted by hand a note: "no wise man would choose to rule" (*Rep*. 1). The quotation from Plato's *Republic* is in 347d6–8.

[b] This may be a reference to the *First Discourse*: "p. m." means "in my possession" (see Strauss, *Gesammelte Schriften*, ed. Meier, 1: 356.

[c] [LS note typed inside the text, but separated by two lines] Gierke, *Althusius* engl. [translation], 337 n. 25: "the very existence of lordship and ownership involved a breach of the pure law of nature." 114 n. 12. Aegidius Collonna III 1 c. 6 supposes 3 possible origins of the state: the purely natural way of the outgrowth from the family, the partly natural of *concordia constituentium civitatem vel regnum* and lastly mere force and conquest. Purely natural = simply just. [The reference to Aegidius Collonna or Giles of Rome is to *De regimine principum*.]

either commutative or distributive justice, i.e., which do not presuppose any positive right. E.g., a positive law which does not contain any arbitrary element, that solves justly without including any arbitrary element the problems arising in a given country at a given time, *is* natural right.[73] Naturally right therefore are the equality of the price of a thing with the value of the labor and expense of the producer of the thing; or the proper proportion between crime and punishment; or the distribution of income from a common enterprise according to the proportion of the shares of the capital contributed by each; or the distribution of ruling offices according to merit, etc. Or, if one wants to have *rules* of natural right, such rules as the prohibition against murder, theft, etc., would be rules of natural right. But: the application of the principles of commutative and distributive justice or of any general or particular rule of natural right is subject to one crucial limitation: that application must not seriously conflict with, i.e., really endanger, the existence of the community as a whole. *All* rules of natural right are subject to the clause: *salus publica suprema lex*. As *a rule*, the principles of natural right must obtain; but *exceptionally* they are *justly* overridden by considerations of *salus publica*. Since those principles obtain as a rule, all *teaching* must proclaim those principles and nothing else; to do this effectively, the rules of natural right must be taught *without qualificati*ons, without ifs and buts (e.g., thou shalt not kill—period). But the omission of all qualifications, which makes the principles of natural right *effective*, makes them at the same time *untrue*. Regarding *any* unqualified rules of natural right, Averroes is right, these unqualified rules are not natural right, but conventional right, if a necessary convention of all civil societies.

The difference between Thomas and Aristotle will appear less great if we consider the fact that Thomas could allow for exceptions to the rules of natural right by falling back on *divine* dispensation. Thomas can afford to assert the immutability of the principles of natural right *merely* because he admits a *divine* right in addition to natural right (*S. th*. II 2, q. 64 a. 6 ad 1; cf. Gierke, 340 n. 39: "For the benefit of the omnipotent Council, Randorf teaches that, if the welfare of the Council requires it, the Council may dispense with the moral law").[a]

[a] Aquinas in the II-II q. 64 a. 6 ad 1 in fact says: "Respondeo dicendum quod aliquis homo dupliciter considerari potest, uno modo, secundum se; alio modo, per comparationem ad aliud. Secundum se quidem considerando hominem, nullum occidere licet, quia in quolibet, etiam peccatore, debemus amare naturam, quam Deus fecit, quae per occisionem corrumpitur. Sed sicut supra dictum est, occisio peccatoris fit licita per comparationem ad bonum com-

All rules of natural right are open to exceptions. But there is no general rule enabling us to decide in advance what cases would call for the rule and what cases would demand the exception. This can only be decided on the basis of knowledge of the *circumstances* ("which with certain people count for nothing"), and the decision can be made rightly only by men of practical wisdom.

Examples of exceptions to natural right: Ostracism, i.e., punishment of innocent, even virtuous men (cf. *Esprit des Lois* 26.16 f.); assassination of potential tyrants; espionage which is impossible without lying, deceit, incitement to treason, at least! One may also think here of the word of Montesquieu that there are cases where one has to *veil* for one moment liberty for the *sake* of liberty (12.19).

Aristotle's doctrine of natural right may be stated in the form of an answer to the question as to whether the end justifies the means, i.e., *any* means, *unjust* means. As a rule, Aristotle suggests, the end, i.e., the common good, justifies only just means; as a rule, the *salus publica* as the remoter purpose of the state is swallowed up completely in its proximate purpose which is justice; but in exceptional cases, the end, i.e., the common good, justifies, i.e., makes truly just, the very transgression of justice proper. But just as we do not entrust the dispensation of poison but to skilled and honest physicians, we must reserve the dispensation of this political poison for the most skilled physician of the body politic, i.e., the true statesman.[74]

Notes

1. *NRH*, 163.

2. Ibid.

3. See *WIPP*. Cf. Michael P. Zuckert and Catherine H. Zuckert, *Leo Strauss and the Problem of Political Philosophy* (Chicago: University of Chicago Press, 2014), p. 147.

4. See *PAW*.

5. See Tony Burns and James Connelly, eds., *The Legacy of Leo Strauss* (Charlottesville, VA: Imprint Academic, 2010). William Clare Roberts, "All Natural Right Is Changeable: Aristotelian Natural Right, Prudence, and the Specter of Exceptionalism," *Review of Politics* 74 (2012): 261–283, notes on p. 264 and in note 17 of the same page how wrong it is to assert that Strauss is not merely noting that in extreme situations the preservation of the state requires suspension of the rules—and is endorsing injustice like Machiavelli.

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mune, quod per peccatum corrumpitur. Vita autem iustorum est conservativa et promotiva boni communis, quia ipsi sunt principalior pars multitudinis. Et ideo nullo modo licet occidere innocentem."

Some, it seems, take Strauss's claim that the "exceptions are as just as the rules" to allow any injustice. The obvious reading is rather that rules cannot foresee all situations and that the supreme rule is the common good.

6. Despite the magnificent presentation of this issue by Devin Stauffer, "On 'Classic Natural Right' in *Natural Right and History*," in *Brill's Companion to Leo Strauss' Writings on Classical Political Thought*, ed. Timothy W. Burns (Leiden: Brill, 2015), we need to consider Strauss's explicit statement in this text: "The choice with which man always was and still is confronted is then that between natural right and the view that all notions of justice are conventional. Precisely because this is the case, the problem of natural right is our *most* serious problem."

7. *NRH*, 3.

8. See *NRH*, 2, with Horace, Letters to Augustus, Epistle 2.1. This reference was called to our attention by Pierre Manent.

9. Cf. WL, lecture 1, p. 6, and *NRH*, 8.

10. "An Introduction to Natural Right" (1931) in Strauss, *Hobbes's Critique of Religion and Related Writings*, ed. Gabriel Bartlett and Svetozar Minkov (Chicago: University of Chicago Press, 2011).

11. These "principles common to every natural law doctrine, these principles [that] are too general, too formal, to be of any significance," are no different from the morality of a gang of robbers. See *PAW*, 112 and ff., especially 116.

12. WL, lecture 1, pp. 1–2.

13. *NRH*, 6.

14. WL, lecture 1, p. 6.

15. Ibid.

16. *PL*, Pref.

17. In the same year, Strauss explains this need for a "fusion" between philosophy and history. See "Political Philosophy and History."

18. For Kant it is a problem, on which he is a far cry from Hobbes: "*the* originator of modern natural right is none other than Thomas Hobbes. Not only does Hobbes with a clarity and emphasis unusual in former times distinguish between natural right and natural law, i.e., between natural right and natural duty; he even makes the natural right as distinguished from the natural duties the very basis, and hence the limits, of all obligations." This passage echoes the chapter on Hobbes in *Natural Right and History*.

19. NR 1946.

20. WL, lecture 5, p. 5. We need to consider that chapters 4 and 6 of *NRH* are the only ones that were not published in academic journals immediately after the lectures (between 1950 and 1952), and may have been edited later. However, the chapter on Rousseau (6A), unlike that on Burke, seems to have been completely written down and diverges from his other 1946 paper on Rousseau's intention.

21. *NRH*, 146.

22. In some of his writings, in particular passages from his *Republic* and *Laws*, Cicero presents a version of the Stoic conception of natural right in which it is not at odds with the requirements of civil society. For this reason, the theory of natural right is typically attributed to Cicero, whose work is the earliest surviving extensive articulation of the

typical premodern natural right theory. Yet Strauss observes that a careful reading of Cicero does not clearly bear out the attribution to Cicero personally of such an approach to natural right. Cicero was himself an Academic skeptic, and the articulation of natural law theory in question here is expressed in his dialogues by adherents of Stoicism; in his *Republic*, Philus, an Academic skeptic, challenges the notion of natural right, and in the same dialogue Scipio strongly suggests that civil law can only be a diluted version of natural law. As Strauss notes, "it is then misleading to call Cicero an adherent of the Stoic natural law teaching" (*NRH*, 156).

23. However, Strauss considers not just this page but Aristotle's philosophy as a whole: "It is in accordance with the general character of Aristotle's philosophy that his teaching regarding natural right is much closer to the ordinary understanding of justice than is Plato's." Cf. Strauss, "Natural Law," in *International Encyclopedia of the Social Sciences*, ed. David L. Sills (New York: Macmillan and Free Press, 1968), 11: 81. He also mentions, besides the famous single page in the *Ethics*, Aristotle's *Rhetoric* 1373b4–18.

24. Strauss does not here make the crucial distinction he makes in the note on Riezler ("Note on 'Some Critical Remarks on Man's Science of Man,'" Leo Strauss Papers, box 14, folder 9) between "human nature," which can be studied through theoretical natural science, and "human things," which are the subject of political philosophy. Nor does he raise, at this point, the possibility of an Aristotelian political science, which is "nothing other than the fully conscious form of the common sense understanding of political things" (*CM*, 12, 25; "Aristotle's cosmology, as distinguished from Plato's, is unqualifiedly separable from the quest for the best political order," *CM*, 21).

25. Leo Strauss, seminar on Aristotle's *Politics*, 1960, lecture 1, p. 1, and more explicitly at pp. 6–7: "The historical reflections are only secondary, by which I implied, although out of a justifiable cowardice—I didn't say at the beginning—I implied that Aristotle's (p. 9) approach is the sound approach, and that is what I meant. And we must—of course, that is an absolutely paradoxical assertion and I beg you to be as resistant to that proposition as you can. But I would like now to say something more simple—the hypothesis that the Aristotelian understanding of social matters is fundamentally superior to our present-day understanding is necessary as a heuristic device. That one—I believe one can prove, as follows. We are perfectly open to the possibility that Aristotle was wrong, and maybe wholly wrong, but we cannot know this, we cannot know that his teaching was wrong if we do not know first what his teaching was. That seems to be absolutely necessary. Otherwise you talk about perhaps a figment of your imagination." Idem, p. 9: Aristotle "is superior," considering the failure of the moderns, p. 21. There would be an advantage replacing the framework of modern science with Aristotle's framework (pp. 214–15). https://leostrausscenter.uchicago.edu/course/aristotle-politics-spring-quarter-1960

26. Cf. "Progress or Return" (*RCPR*, 227–70).

27. Saint Thomas's doctrine of natural right is considerably more straightforward in this regard than that of either Plato or Aristotle: for Thomas, "the principles of the moral law, especially as formulated in the Second Table of the Decalogue, suffer no exception, unless possibly by divine intervention" (*NRH*, 163). In the Thomistic view, conscience is the means whereby the dictates of natural law are made known to all, probably due to the eventually widespread acceptance of biblical revelation. Yet if it is faith in divine revela-

tion that is the key element here, we are faced with the concern that what Saint Thomas considers to be natural law does not in fact qualify as natural law on the classical criterion of ability to be discerned by the reasoning of the unaided human mind; the knowledge of the Thomistic absolute natural right depends to an extent upon divine communication. Furthermore, Thomas accepts a twofold picture of the natural aim of man, encompassing both intellectual and moral perfection; but, in order to account for the importance of moral virtue, he argues that man's natural aim is in itself insufficient and points beyond itself; natural law is only perfected by divine law. Natural right thus becomes inherently bound up with theology and, in particular, revealed theology. The modern theory of natural law was formulated in part as a reaction to the Thomistic theory, as a return to a conception of natural law as something that ought to be more obviously compelling, more truly self-evident, than contentious points of revealed theology. Modern natural right theorists such as Montesquieu intended to restore to the statesman the deliberative responsibility and autonomy he possessed in the ancient model. The best analysis of conscience is in *TOM*, 149: "[Machiavelli's] destructive analysis of . . . conscience" shows possible later reservations on Strauss's part.

28. A balanced survey of the question can be found in Douglas Kries, *The Problem of Natural Law* (Lanham, MD: Lexington Books, 2008). An overview of the evidence can be found on pp. 29–44. Harry V. Jaffa, *Thomism and Aristotelianism: A Study of the Commentary by Thomas Aquinas on the Nicomachean Ethics* (Chicago: University of Chicago Press, 1952), radicalized Strauss's view as presented in *NRH*.

29. *NRH*, 161.

30. *NRH*, 162. See Strauss to Helmut Kuhn, undated, *Independent Journal of Philosophy* 2 (1978). Strauss avers in these letters that "what Aristotle and Plato say about man and the affairs of men makes infinitely more sense to me than what the moderns have said or say." In addition, he states, even more assertively, that the "whole Platonic doctrine of the order of the soul and of the order of the virtues is the doctrine of natural right"—if justice is correctly understood, that is, "if it is true that 'justice' does not necessarily mean one of the many virtues but the all-comprehensive virtue" (24).

31. *NRH*, 64; see also 202 and ff.

32. See WL, lecture 1, p. 6.

33. "seems to be" was inserted by Strauss.

34. "own" was inserted by hand.

35. "not" was inserted by hand.

36. "in-" before "sufficient" was inserted by hand.

37. Strauss wrote "are."

38. "standards" was crossed out and "ideals" inserted by hand.

39. An "o"[r] in the margin was crossed out. Many other letters were added by hand in this typescript at the end of the lines, where the typewriter failed. We do not mention in notes these frequent insertions by hand.

40. "or legitimate" was inserted by hand.

41. Strauss wrote "it."

42. "that of" was inserted by hand.

43. The quotation marks are ours.

44. This sentence was handwritten in the margin.
45. "a" was inserted by hand.
46. The word "*novam*" is both underlined and italicized in the typescript.
47. "the" was crossed out.
48. There is an error that was not corrected in the typescript: "as it we," instead of "it."
49. The word "establishment" was typed above a crossed-out word.
50. "either impossible or else" was inserted by hand.
51. "in a sense" was inserted by hand and "merely" was crossed out.
52. We have inserted "his."
53. "is" instead of "or" was not corrected by Strauss.
54. The word "mere" was typed and inserted above the line.
55. "way" was inserted by hand.
56. We have changed "of" to "for."
57. Several words were crossed out in the typescript.
58. Several words crossed out in the typescript were replaced by "effort."
59. "modern" was inserted by hand.
60. This sentence was written in Strauss's hand in the margin.
61. We have inserted "rather expects the."
62. The sentence "Present day: the emergence of truth by the free trade of ideas" was inserted by Strauss's hand in the margin.
63. "or *securing*" was typed above the line.
64. Following "which," the word "every" was crossed out.
65. "or, more precisely, of the period of founding" was inserted by hand in the margin.
66. We have inserted "be," missing in the text.
67. Two words were crossed out, "natural" and an illegible one; "character" was inserted by hand.
68. The handwritten "of" replaced the typed words "as to."
69. "as" was inserted and "than" was crossed out.
70. We have changed "his" to "its."
71. We have changed "of" to "for."
72. The word "manifest" was crossed out.
73. Strauss inserted this sentence by hand in the margin.
74. The final part of this sentence was handwritten by Strauss, "political poison for the most skilled physician of the body politic, i.e., the true statesman."